OAH Docket No. 4-0900-11252-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA COMMISSIONER OF HEALTH

In the Matter of an
Administrative Penalty Order
Issued to Charles Dale
Dated May 9, 1997

RECOMMENDATION ON MOTIONS FOR SUMMARY DISPOSITION

This matter was initiated by the Minnesota Department of Health (hereinafter the "Department") by a Notice of and Order for Expedited Administrative Hearing, dated July 14, 1997, which was duly served upon Scott R. Timm, attorney of record for Charles Dale (hereinafter the "Mr. Dale"). The Notice stated, among other things, that pursuant to Minn. Stat. § 144.991, subd. 5 (1996), an expedited hearing was to be held on August 8, 1997, at which time Mr. Dale would have an opportunity to contest the Department's Administrative Penalty Order of May 9, 1997. Subsequently, counsel for both parties conferred and agreed that an evidentiary hearing in this matter was unnecessary and that the issues could be determined by motions for summary disposition. Counsel further agreed that the parties' motions for summary disposition could be considered on their written submissions and that oral argument was unnecessary.

On August 18, 1997, the Department and Mr. Dale served and filed written motions and supporting documentation pursuant to Minn. R. 1400.5500 (K) and 1400.6600 (1995), each requesting a summary disposition on the grounds that no genuine issue of material fact exists with respect to this proceeding and that, as a matter of law, each was entitled to prevail on the merits of this appeal from the Department's order.

The above-entitled matter is, therefore, before the undersigned Administrative Law Judge on the parties' cross motions for summary disposition. Susan A. Casey, Assistant Attorney General, Suite 500, 525 Park Street, St. Paul, Minnesota 55103-2106, appeared on behalf of the Department. Scott R. Timm, Attorney at Law, 133 West First Street, Waconia, Minnesota 55387, appeared on behalf of Mr. Dale. The record closed on this motion on September 1, 1997, when the parties' reply briefs were due.

Based upon all of the records, files, and proceedings herein, IT IS HEREBY RECOMMENDED :

(1) That Mr. Dale's Motion for Summary Disposition be DENIED;

(2) That the Department's Motion for Summary Disposition be GRANTED; and

(3) That the Commissioner of Health enter an Order upholding the Department's Administrative Penalty Order and dismissing Mr. Dale's appeal therefrom.

Dated this _____ day of September, 1997.

_____
BRUCE H. JOHNSON
Administrative Law Judge

MEMORANDUM

Contentions of the Parties

The Department filed and served a Notice of and Order for Expedited Administrative Hearing in this matter on July 14, 1997, seeking an administrative hearing on Mr. Dale's appeal from an Administrative Penalty Order issued by the Department on May 9, 1997. The basis for the Administrative Penalty Order is the Department's claim that Mr. Dale installed a septic tank within the isolation distance established by rule for a well on his property. The Department contends that Mr. Dale's actions violated Minn. R. 4725.4450 (1995) and Minn. Stat. § 103I.205, subd. 6 (1996), making him subject to a monetary penalty under Minn. Stat. § 144.99, subd. 4 (1996) and to a corrective order under Minn. Stat. § 144.991, subd. 3 (1996).

Mr. Dale first contends that since the diagonal distance between the septic tank and the water supply level of the nearby well is in excess of the separation distance specified by the Department's rules, he is not in violation of any applicable statutes or rules. Second, he contends that the Administrative Penalty Order is inappropriate because the Department has failed to show that any environmental or public health damage has actually occurred. Finally, Mr. Dale suggests that the terms and conditions of the Administrative Penalty Order are unreasonable because there is no alternative complying location on his property for a water supply well.

The Movants' Burdens

In considering motions for summary disposition in administrative contested case proceedings, administrative law judges look to the standards developed in district court practice for considering motions for summary judgment. See Minn. Rules, pt. 1400.6600 (1995). Like summary judgment, summary disposition is appropriate "where there is no genuine issue as to any material fact." Minn. Rules, pt. 1400.5500(K) (1995); compare Minn. R. Civ. P. 56.03; Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Theile v. Stich, 425 N.W.2d 580, 583 (Minn. 1988). In a motion for summary disposition made by the party having the burden of proof, the initial burden is on the moving party to show facts that establish a prima facie case and to assert that no material issues of fact remain for hearing. Id. Once the moving party has established a prima facie case, the burden shifts to the non-moving party. Minnesota Mutual Fire and Casualty Company v. Retrum, 456 N.W.2d 719, 723 (Minn. App. 1990). To successfully resist a motion for summary disposition where a prima facie case has been established, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986). General averments are not enough to meet the non-moving party's burden under Minn. R. Civ. P. 56.05. Id.; Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988).

Here, both parties have moved for summary disposition, so neither claims the existence of any genuine issue of material fact. The Department's position must, therefore, necessarily be that application of the law to uncontroverted facts establish prima facie that Mr. Dale committed violations of Minn. R. 4725.4450 (1995) and Minn. Stat. § 103I.205, subd. 6 (1996), and that the uncontroverted facts also fail to establish the existence of any affirmative defenses to those claimed violations. Concomitantly, Mr. Dale's position must necessarily be either that the undisputed facts show a failure by the Department to establish one or more elements of a prima facie case of liability under applicable statutes or rules or, if a prima facie case has been shown, that the undisputed facts establish a recognized affirmative defense to liability under applicable statutes or rules.

Facts

The affidavits and documentary evidence submitted by the parties established the following uncontroverted facts:

Mr. Dale owns residential property bordering Lake Marion in McLeod County, Minnesota. In 1969, approximately four years before the state's first Well Code became effective, Mr. Dale had a 125-foot deep well installed on the property. At about the same time, he had a 1,300-gallon septic tank installed.[1]

In December of 1994, the McLeod County Office of Planning and Zoning and Environmental Services (hereinafter the "County") received a complaint that the septic system on Mr. Dale's property was seeping into the ground. In January of 1995, the County sent Mr. Dale a letter that, among other things, instructed him to submit a plan for corrective action. Mr. Dale did not reply to that letter. (Affidavit of Roger Berggren) In the fall of 1995 and without prior communication with the County, Mr. Dale replaced his original septic tank and also replaced the pipes that conveyed effluent from the septic tank to a pre-existing drainfield. Mr. Dale neither obtained a permit nor sought prior approval of plans for the alterations to his septic system. (Affidavit of Roger Berggren)

On June 28, a licensed County inspector inspected Mr. Dale's septic tank and drainfield and cited them both as failing to comply with certain applicable laws and rules. The new septic tank was installed 45 feet from the ordinary high water mark of Lake Marion, rather than 75 feet, as required by County Ordinance. Also, the County inspector observed that the replacement piping to convey effluent from the septic tank to the drainfield consisted of perforated flexible hosing. Minn. R. pt. 7080.0170, subp. 2(B) (1995) requires that solid pipe be used for that purpose, since the use of perforated piping allows effluent to be discharged directly into the soil. (Affidavit of Roger Berggren)

As of November of 1996, Mr. Dale had taken no steps to correct the noncomplying features of his septic system or to seek variances. (Affidavit of Roger

Berggren) On November 19, 1996, Douglas S. Edson (hereinafter "Mr. Edson"), the Department's district hydrologist, inspected both the septic system and a well on Mr. Dale's property. By Mr. Edson's measurements, the horizontal distance between the septic tank and perforated drain tile to the well head was 42 feet. (First Affidavit of Douglas Edson) By the measurements of Jeffrey R. Rausch, a licensed surveyor engaged by Mr. Dale, that horizontal distance is 45 feet. (Exhibit A to Mr. Dale's Motion and Brief) The diagonal distance from the septic system to the water supply level of the well is approximately 133 feet. Minn. R. pt. 4725.4550, subp. 1(E)(8) (1995) requires an isolation distance of 50 feet between a septic system and a water supply well. Based on Mr. Edson's inspection of the property, he concluded that there are alternative complying locations for both the septic system and the well based on the physical layouts of, and the sources of contamination on, Mr. Dale's property and the three adjoining properties. (First Affidavit of Douglas Edson) There are at least two alternative complying locations on Mr. Dale's property for a replacement well. (Second Affidavit of Douglas Edson)

On December 5, 1996, the Department issued a Notice of Violation to Mr. Dale instructing him either to relocate portions of his septic system or to seal his well and construct a replacement well in a complying location. (Attachment 1 to First Affidavit of Douglas Edson) Mr. Dale did not comply with the instructions in that letter. (First Affidavit of Douglas Edson) On February 28, 1997, the Department sent Mr. Dale another letter requiring him to make the specified corrections or otherwise produce information why the Department should not proceed with an enforcement action. (Attachment 1 to Affidavit of James Harris) Mr. Dale did not indicate to the Department his willingness to comply with that directive.

Analysis of a water sample which Mr. Dale brought to Tri County Water in about March of 1997 indicated that the sample was suitable for human consumption and met all EPA standards. (Exhibit C to Mr. Dale's Motion and Brief)

On April 24, 1997, Department staff met to determine whether a formal enforcement action was warranted based on Mr. Edson's findings that alternative complying locations for both the septic system and the well were available. They concluded that Mr. Dale could correct the violations in either one of two ways: (1) by moving the septic tank and perforated drain tile; or (2) by sealing the existing well and constructing a new well at the northeast corner of the property. (Attachments 3 and 4 to Affidavit of James Harris) On April 30, 1997, Mr. Harris contacted Mr. Dale to inform him of the Department's decision to proceed with formal action in the form of an administrative penalty order and to explain the appeal process to him. (Affidavit of James Harris) On May 9, 1997, the Department issued an Administrative Penalty Order, which included a Corrective Order, instructing Mr. Dale to take either one of the two corrective options described above. It also assessed a $1,000 penalty that was forgivable if he took appropriate corrective action within 30 days. (Attachment 7 to Affidavit of James Harris) On July 11, 1997, counsel for Mr. Dale notified the Department of his appeal from the Administrative Penalty Order. (Attachment 8 to Affidavit of James Harris) This proceeding ensued.

The Department's Prima Facie Case of Liability

Minn. Stat. § 103I.205 (1996) provides:

> Subd. 6**. Distance requirements for sources of contamination**. (a) A person may not place, construct, or install an actual or potential source of contamination any closer to a well than the isolation distances prescribed by the commissioner by rule unless a variance has been prescribed by rule.
>
> (b) The commissioner shall establish by rule reduced isolation distances for facilities which have safeguards in accordance with sections 18B.01, subdivision 26, and 18C.005, subdivision 29.

Minn. R. pt. 4725.4550, subp. 1 (1995) provides in pertinent part:

> Subpart 1. **Isolation distances**. A water supply well must be located where there is optimum surface drainage and at the highest practical elevation. A water supply well must be as far as practical from a contamination source, but no less than 150 feet upgrade from a sanitary landfill, dump, or waste stabilization pond.
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> A water supply well must be no less than:
>
> * * *
>
> E. 50 feet from:
>
> * * *
>
> (8) a septic tank, sewage lift station, nonwatertight sewage sump, or holding tank;

The undisputed facts established that in the fall of 1995 Mr. Dale replaced the original septic tank on his property with a new septic tank, together with perforated pipes conveying septic tank effluent to a pre-existing drainfield. The horizontal distance from the septic tank to the top of the nearby well is no greater than 45 feet.[2] The diagonal distance from the septic tank to the bottom of the nearby well is approximately 133 feet. When specifying that a water supply well must be located "no less than 50 feet" from a septic tank, Minn. R. pt. 4725.4550, subp. 1 (1995) does not expressly specify how that distance should be measured -- that is, horizontally from a contamination source to a well head, diagonally from a contamination source to a well's water supply level, either, or both. The rule is, therefore, ambiguous, and the task of the Administrative Law Judge is to ascertain the intent of the rulemaking authority at the time this requirement of the rule was adopted.

Page 7 of the Statement of Justification, which the Department prepared and promulgated when the isolation distance provisions of Well Construction Code were originally adopted,[3] provided in part:

> (bb)(cc) Under most geological conditions found in Minnesota, 50 feet is considered a safe horizontal distance from sources of contamination except cesspools and leaching pits, in which case 75 feet is necessary (paragraph 701, Section VII, Manual of Water Supply Sanitation, MHD 1969) [Emphasis supplied.]

(Attachment 1 to the Second Affidavit of James K. Harris) When interpreting an ambiguous rule, it is appropriate to consider the rulemaking history, including statements of justification and statements of need and reasonableness, to determine the intent of the rulemaking authority. See, e.g., Rocco Altobelli v. State, Dept. of Commerce, 524 N.W.2d 30 (Minn. App. 1994); St. Otto's Home v. Minnesota Dept. of Human Services, 437 N.W.2d 35, 39 (Minn. App. 1989), rev'd on other grounds, 437 N.W.2d 35 (Minn. 1989). Although the interpretation of a rule is a question of law, the rulemaking authority's intent in drafting the rule should be accorded considerable deference. In St. Otto's Home, supra, 437 N.W.2d at 39-40, the Minnesota Supreme Court discussed the role that an agency's interpretation of an ambiguous rule should play in determining how the rule should be applied:

> When a decision turns on the meaning of words in a statute or regulation, a legal question is presented. Northern Natural Gas Co. v. O'Malley, 277 F.2d 128, 137 (8th Cir. 1960) (citing Trust of Bingham v. Commissioner, 325 U.S. 365, 371, 65 S. Ct. 1232, 1235, 89 L.Ed. 1670 (1945)). In considering such questions of law, reviewing courts are not bound by the decision of the agency and need not defer to agency expertise. State by McClure v. Sports & Health Club, 370 N.W.2d 844, 854 n. 17 (Minn. 1985); No Power Line Inc. v. Minnesota Envtl. Quality Council, 262 N.W.2d 312, 320 (Minn. 1977). When the agency's construction of its own regulation is at issue, however, considerable deference is given to the agency interpretation, especially when the relevant language is unclear or susceptible to different interpretations. See Udall v. Tallman, 380 U.S. 1, 16, 85 S. Ct. 792, 801, 13 L.Ed.2d 616 (1965); Resident v. Noot, 305 N.W.2d 311, 312 (Minn. 1981). If a regulation is ambiguous, agency interpretation will generally be upheld if it is reasonable. See Aluminum Co. v. Central Lincoln Peoples' Util. Dist., 467 U.S. 380, 389, 104 S. Ct. 2472, 2479, 81 L.Ed.2d 301 (1984); Udall, 380 U.S. at 18, 85 S. Ct. at 802.

In addition to the reasonableness of an agency's interpretation of its rule, consideration should be given to its durability. Deference should be given to an agency rule interpretation that is "longstanding." The evidence submitted by the Department establishes that it has consistently interpreted the term "distance" in Minn. R. pt. 4725.4550, subp. 1 (1995), as horizontal distance from a contamination source to a well

head for more than 20 years.[4] Finally, the extent to which the agency's interpretation of the rule is in accord with "the express purpose of the [a]ct and the intention of the legislature" must be considered. Rocco Altobelli, supra, 524 N.W.2d at 30. The following was the legislature's stated intent in adopting Chapter 103I, pursuant to which the rule in question was adopted:

> **103I.001 Legislative intent**.
>
> This chapter is intended to protect the health and general welfare by providing a means for the development and protection of the natural resource of groundwater in an orderly, healthful, and reasonable manner.

Here, the Department's interpretation of the rule is reasonable,[5] longstanding, and gives effect to the legislature's intent. In view of all this, the Administrative Law Judge concludes that the term "distance," as used in Minn. R. pt. 4725.4550, subp. 1 (1995), means horizontal distance from a contamination source to the well head. Accordingly, the locations of Mr. Dale's septic tank and well are in violation of that rule, and Mr. Dale is subject to the enforcement provisions of Minn. Stat. § 144.99 (1996).

Lack of Actual Public Health or Environmental Damage

Mr. Dale submitted a sample of the water from his well for analysis. That analysis indicated that the sample he provided was "suitable for human consumption and meets EPA standards." (Exhibit C to Mr. Dale's Motion and Brief) In other words, he suggests and argues that the administrative penalty and corrective orders are inappropriate because the Department has failed to show that any environmental or public health damage has actually occurred. The Department, on the other hand, argues that the water analysis report should be disregarded as unreliable for lack of foundation and, further, that the fact that a sample may have tested safe on one occasion does not necessarily establish the safety of the well. It is unnecessary, however, even to consider Mr. Dale's assertions about the safety of his well water.

Minn. Stat. § 144.99 (1996) empowers the Commissioner to take one or more of the enforcement actions described in that statute against a person who violates the statutes and rules described in Subdivision 1, including Minn. Stat. ch. 103I and rules promulgated thereunder. There is nothing in statute or rule that requires the Department to establish actual public health or environmental danger before taking enforcement action against a person who violates the isolation distance provisions of Minn. R. pt. 4725.4550, subp. 1 (1995).[6] In other words, establishing an absence of any actual public health or environmental damage to the water of a noncomplying well does not represent an affirmative defense to an enforcement action under Minn. Stat. § 144.99 (1996).

Availability of an Alternative Complying Location for the Well

Finally, the Department's Corrective Order of May 9, 1997, provides Mr. Dale with two options for corrective action:

> Option 1:
>
> 1. The buried sewer line and septic tank presently located within 50 feet of the subject well must be moved to a location which meets all requirements of Minnesota Rules, Chapter 4725, and Minnesota Statutes, Chapter 103I.
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> Option 2:
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> 1. The subject well shall be permanently sealed by a licensed well contractor or licensed well sealing contractor in accordance with the requirements of Minnesota Rules, Chapter 4725, and replaced with a complying well which meets all requirements of Minnesota Rules, Chapter 4725.

The Department then goes on to assess a $1,000 penalty upon Mr. Dale -- a penalty, however, that is forgivable if he complies, or takes appropriate steps toward complying, with either one of these two options for corrective action within 30 days.

Mr. Dale's final argument is that the Administrative Penalty Order is unreasonable because the second option is impossible -- that is, drilling a new complying well in another location on his property. Unreasonableness of the Administrative Penalty Order for lack of another complying well location is an affirmative defense with respect to which Mr. Dale has the burden of proof. The availability of that defense turns on whether there actually is an alternative complying location for a well on Mr. Dale's property -- an issue of material fact. The question then becomes one of whether that issue of fact is a genuine one. A party moving for summary disposition, who has the burden of persuasion with respect to an issue at the hearing, must offer evidence to support the motion that would be admissible at the hearing. Minn. R. Civ. P. 56.03; Hopkins by LaFontaine v. Empire Fire and Marine Ins. Co., 474 N.W.2d 209 (Minn. App. 1991); Murphy v. Country House, Inc., 307 Minn. 344, 349, 240 N.W.2d 507, 511 (1976). Mere allegations or assertions are clearly insufficient. Moreover, the evidence must be viewed in the light most favorable to the nonmoving party -- the Department -- with respect to this issue. All doubts and factual inferences must be resolved against Mr. Dale. LaFontaine, supra, 474 N.W.2d at 212; Nord v. Herreid, 305 N.W.2d 337, 339 (Minn. 1981).

Here, Mr. Dale offered nothing to support his contention that there are no alternative complying well locations on his property other than some bare assertions in the memoranda supporting his motion. He produced no evidence in any of the forms specified by Minn. R. Civ. P. 56.03. On the other hand, the Department offered the expert opinion testimony of a hydrologist, Douglas S. Edson, in affidavit form to

establish that there were at least two alternate locations for a replacement well on Mr. Dale's property. (First and Second Affidavits of Douglas S. Edson) In short, Mr. Dale has failed to meet his burden of establishing the unreasonableness of the options for corrective action set forth in the Administrative Penalty Order of May 9, 1997.

It is for these reasons that Mr. Dale's motion for summary disposition should be denied and the Department's motion for summary disposition granted.

B. H. J.

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[1] Although the foregoing facts were submitted as assertions in Mr. Dale's Motion and Brief and not in affidavit form, they merely represent useful background information and are not in dispute.

[2] The Department's measurements indicate a horizontal distance of 42 feet. (Affidavit of Doublas Edson) A surveyor engaged by Mr. Dale determined that distance to be 45 feet. (Exhibit A to Mr. Dale's Motion and Brief) For purposes of determining whether the Department has established a prima facie case of liability, the Administrative Law Judge views the evidence in the light most favorable to Mr. Dale.

[3] The rules that comprised the original Well Construction Code were adopted in 1974 -- prior to the enactment of Minnesota's current Administrative Procedure Act, Minn. Stat. ch. 14 (1996). Minn. Stat. § 14.131 (1995) now requires agencies to "prepare, review, and make available for public review a statement of the need for and the reasonableness of the rule," which is a key part of the rulemaking history. Rulemaking in 1974 was governed by rules of the Attorney General. Those rules required agencies to prepare "statements of justification," which served much the same role as statements of need and reasonableness serve today.

[4] Compare the 1974 Statement of Justification (Attachment 1 to the Second Affidavit of James K. Harris) with the 1994 "Rules Handbook: A Guide to the Rules Relating to Wells and Boring" Justification (Attachment 2 to the Second Affidavit of James K. Harris).

[5] On the other hand, Mr. Dale's interpretation -- that isolating distances between contamination sources and wells should be measured diagonally from contamination source to water supply level -- could produce results that are unreasonable. For example, under that interpretation, any well over 50 feet deep could be located immediately adjacent to a septic tank. This would pose a very high risk of a public health problem if the septic tank failed. In fact, it was failure of an earlier septic tank that prompted Mr. Dale to install a new one.

[6] A common purpose of rules is to prevent conditions that are harmful from ever happening in the first place. So evidence that no harm has yet occurred in a particular situation or at a particular time does not diminish the legitimacy of the rule or the appropriateness of actions to enforce it.